INDEX

Appendix A
United States v. Peel, 595 F.3d 763 (7th Cir. 2010) 1a

Appendix B
United States v. Peel, No. 06-CR-30049-WDS (S.D. Ill. July 23, 2007) 23a

Appendix C
Verdict, *United States v. Peel*, No. 06-CR-30049-WDS (S.D. Ill. Mar. 23, 2007) 37a

Appendix D
Judgment, *United States v. Peel*, No. 06-CR-30049-WDS (S.D. Ill. Nov. 19, 2007) 39a

Appendix E
Order denying rehearing, *United States v. Peel*, No. 07-3933 (7th Cir. Mar. 15, 2010) 45a

Appendix A

United States Court of Appeals,
Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Gary E. PEEL, Defendant-Appellant.

No. 07-3933.

Argued Dec. 10, 2009.
Decided Feb. 12, 2010.

Before POSNER, MANION, and HAMILTON, Circuit Judges.

POSNER, Circuit Judge.

The defendant was convicted by a jury of bankruptcy fraud, obstruction of justice, and possession of child pornography, and was sentenced to 144 months in prison. His appeal challenges both the convictions and the sentence.

The events giving rise to this case go back a long way. In 1967 the defendant married. Seven years later he began an affair with his wife's 16-year-old sister. In the course of the affair, which lasted several months, he took nude photographs of her that the jury found were sexually explicit within the meaning of the child-pornography statute; he does not contest that finding. In response to her later

request for the pictures, he gave her some of them (which she then destroyed) and, without telling her, retained others in a file in his office.

In June 2003 the Peels divorced, and agreed to a marital settlement. The following year Peel filed suit in an Illinois state court to vacate the settlement. The year after that he filed for bankruptcy and asked the bankruptcy court to discharge the financial obligations to his ex-wife that the settlement agreement had imposed. She opposed the discharge and filed a claim for the money that he owed her under the settlement. "Discharge" may not be the right word for what he was seeking-"abandonment" probably is better-because his debt to her under the settlement probably was not dischargeable in bankruptcy under the Bankruptcy Code as it then read. 11 U.S.C. §§ 523(a)(5), (15)(A), (B) (2005); *In re Crosswhite,* 148 F.3d 879, 881-82 (7th Cir. 1998); *In re Reines,* 142 F.3d 970, 972-73 (7th Cir. 1998); *In re Daulton,* 139 B.R. 708, 710 (Bankr. C.D. Ill. 1992). (Under the current Code, it almost certainly would not be dischargeable. See 11 U.S.C. §§ 101(14A), 523(a)(5), (15).) So he had to persuade her to drop the claim.

Negotiations looking to compromise it were predictably acrimonious and in the course of them the defendant told her about the nude photographs of her sister and said that "these would be ... an item that would likely get out into the public if we didn't stop this escalating battle of putting things in the newspaper." He backed up his threat by placing

photocopies of the photographs in her mailbox. She complained to the police and later to federal authorities, and at their direction made recorded phone calls to the defendant. The conversations confirmed that he was blackmailing her with the photographs. He faxed her a draft of a settlement agreement that she had previously rejected, adding a provision requiring him to return certain unidentified photographs to her. They met and he showed her the originals. The meeting was recorded, and included an exchange in which she said: "So you resort to blackmailing me?" He replied: "There's nothing left. I'm down to: no kids; no grand-kids; no money." "And, so," she responded, "blackmailing me with photographs.... Okay, but as long as I go ahead and sign these settlement agreements...." He replied: "Right then you have...." And she: "... you'll give me the photographs...." And he: "On the spot."

He was convicted as we said of both bankruptcy fraud and obstruction of justice. He argues that to convict him of both violated the double jeopardy clause of the Fifth Amendment, because one offense is included in the other. It might seem that there would be no issue of double jeopardy in a case in which multiple convictions occurred in the same trial, *Williams v. United States,* 150 F.3d 639, 641 (7th Cir. 1998); *United States v. Masters,* 978 F.2d 281, 285 (7th Cir. 1992), since the purpose of the clause is " 'to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.' " *Missouri v. Hunter,* 459 U.S. 359, 365-68, 103 S. Ct.

673, 74 L.Ed.2d 535 (1983), quoting *Burks v. United States,* 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1978). But the Supreme Court has held that "with respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause ... prevent[s] ... the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter, supra,* 459 U.S. at 366, 103 S. Ct. 673; *see also Ohio v. Johnson,* 467 U.S. 493, 499, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984) ("the final component of double jeopardy-protection against cumulative punishments-is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature"); *United States v. Konopka,* 409 F.3d 837, 838-39 (7th Cir. 2005); *United States v. Fischer,* 205 F.3d 967, 969 (7th Cir. 2000); *United States v. Hector,* 577 F.3d 1099, 1100-01 (9th Cir. 2009); *United States v. Miller,* 527 F.3d 54, 70-73 (3d Cir. 2008). Some of the Justices disagree with this extension of the double jeopardy clause-see the discussion of their views in *White v. Howes,* 586 F.3d 1025, 1032-35 (6th Cir. 2009)-but for now, at least, it is the law and binds us.

So are bankruptcy fraud and obstruction of justice committed in a bankruptcy proceeding the same offense for purposes of double jeopardy? Bankruptcy fraud requires, so far as relates to this case, that the defendant "knowingly and fraudulently ... offers compensation ... for ... forbearing to act in any case under" the Bankruptcy Code. 18 U.S.C. § 152(6). ("[F]orbearing to act" in this case would mean his ex-wife's abandoning her bankruptcy claim.)

Obstruction of justice requires that the defendant "corruptly obstructs, influences, or impedes any official proceeding, or attempts to do so." 18 U.S.C. § 1512(c)(2). So the elements of the offenses are different, as the government points out. But since a bankruptcy proceeding is an "official proceeding," within the meaning of the obstruction of justice statute, 18 U.S.C. § 1515(a)(1)(A) ("the term 'official proceeding' means ... a proceeding before ... a bankruptcy judge"), the defendant's conviction for having attempted fraudulently to influence the bankruptcy proceeding by blackmailing his ex-wife into agreeing to drop her claim convicted him of obstruction of justice as well.

The test for "whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Missouri v. Hunter, supra,* 459 U.S. at 366, 103 S. Ct. 673, quoting *Blockburger v. United States,* 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). The test was flunked here because convicting Peel of obstruction of justice did not require proof of any fact that didn't have to be proved to convict him of bankruptcy fraud. It was thus a lesser-included offense of bankruptcy fraud and the *Blockburger* test makes clear, and many cases hold, that to punish a person for a lesser-included offense as well as the "including" offense is double jeopardy unless Congress intended the double punishment. *Rutledge v. United States,* 517 U.S. 292, 297-98 and n.6, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996); *United States v. Fischer, supra,* 205 F.3d at 969; *United States v. Xavier,* 2 F.3d 1281, 1291 (3d Cir. 1993).

The government does not argue that Congress intended that.

This is like a case in which a person is tried for both murder and attempted murder. The elements are different, but since conviction for murder automatically convicts the defendant of attempted murder (for there can be no murder without attempting the deed), the defendant cannot be convicted of both crimes. See, e.g., *People v. Davidson,* 159 Cal. App. 4th 205, 70 Cal. Rptr. 3d 913, 917-18 (2008). There is an exception for cases in which the defendant was convicted of the lesser-included offense before he could have been prosecuted for the greater one, as when the defendant is convicted of attempted murder and later his victim dies. In such a case he can be tried for murder. *People v. Carrillo,* 164 Ill. 2d 144, 207 Ill. Dec. 16, 646 N.E.2d 582, 584-85 (1995). The exception has no application to this case, which must therefore be remanded with directions that the judge vacate one of the two convictions.

The defendant argues that his conviction for obstruction of justice is the one that should be vacated, even though it carries the higher statutory maximum sentence, because it is a lesser-included offense of bankruptcy fraud. It is lesser in the sense of having fewer elements, see *United States v. Smith,* 34 F.3d 514, 517-18 (7th Cir. 1994); *United States v. Harley,* 990 F.2d 1340, 1343-44 (D.C. Cir. 1993), because one can commit obstruction of justice without committing bankruptcy fraud but not

bankruptcy fraud without committing obstruction of justice. That is the only sense of "lesser" that matters under the *Blockburger* test: that offense *A* has elements *a, b, c,* and offense *B* has elements *a, b, c,* and *d,* so that conviction of *B* automatically convicts the defendant of *A* as well. The remedy is to eliminate the doubleness. But which conviction must be vacated is not dictated by the Constitution. It is a matter committed to the trial judge's discretion because functionally it is a decision concerning the length of the defendant's sentence. *Ball v. United States,* 470 U.S. 856, 864, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985); *Lanier v. United States,* 220 F.3d 833, 841-42 (7th Cir. 2000); *United States v. Fischer, supra,* 205 F.3d at 970 n.2; *United States v. Hector, supra,* 577 F.3d at 1103-04; *United States v. Miller, supra,* 527 F.3d at 74. But usually it's the conviction carrying the lesser penalty that is vacated. As we noted in *Lanier,* it would be paradoxical to give the defendant a shorter sentence than he would have received had the government not also charged him with the less serious offense. 220 F.3d at 842.

What is true is that in a case in which the lesser-included offense has fewer elements *and* is the less serious offense, vacating the sentence for the graver offense would be an abuse of discretion: imagine convicting a person of attempted murder and of murder and punishing him only for the attempt. This is not such a case; the lesser-included offense of obstruction of justice is the graver offense.

The defendant argues that it was not proved beyond

a reasonable doubt that he had committed either bankruptcy fraud or obstruction of justice. Regarding the obstruction charge, he argues that he did not act "corruptly" because he was prepared to disclose the photographs to the bankruptcy court. That is a distortion of the deal he tried to make with his ex-wife. The deal was that she would abandon her claim and in exchange would get the photographs. He expected her to keep them secret from the world, including the bankruptcy court, not only because they were an embarrassment but also because if the bankruptcy judge discovered that the ex-wife had been blackmailed into dropping her claim he would be certain to notify the authorities and the deal would collapse. Peel's expectation of secrecy was disappointed because his ex-wife went to the police. So there was no actual obstruction of justice, merely an attempt, but the statute punishes the attempt equally with the achieved obstruction.

His main argument against the conviction for bankruptcy fraud is that his object was to get his ex-wife to drop her opposition to his state-court suit to dissolve the marital agreement. That was one object but he also wanted her claim in the bankruptcy proceeding dismissed because in all likelihood it was not dischargeable in bankruptcy.

He further argues that bankruptcy fraud does not extend to fraud committed in an "adversary proceeding" in bankruptcy. The term refers to proceedings to resolve claims within the overall bankruptcy case; a proceeding to object to the

discharge of a debt or to determine its dischargeability is a typical adversary proceeding. Fed. R. Bankr. P. 7001(4), (6); see *Zedan v. Habash*, 529 F.3d 398, 402-03 (7th Cir. 2008); *In re Marchiando*, 13 F.3d 1111, 1113-14 (7th Cir. 1994); *In re Duncan*, 448 F.3d 725, 726 (4th Cir. 2006). An adversary proceeding is thus part of the bankruptcy but it is not the bankruptcy case itself, as illustrated by the fact that the dismissal of an adversary proceeding is an appealable final order even though the bankruptcy case continues. *In re Marchiando, supra*, 13 F.3d at 1113-14.

Bankruptcy fraud is fraud committed "in any case under title 11" of the U.S.Code, 18 U.S.C. § 152(6), that is, under the bankruptcy code; and we cannot find any authority on whether *all* adversary proceedings in bankruptcy are "case[s] under title 11" within the meaning of the section. The fact that some adversary proceedings can be heard in state court, 28 U.S.C. §§ 1334(a), (b); 1 *Collier on Bankruptcy* ¶ 3.01[1] (15th ed.2009), and that in many such proceedings no issue of bankruptcy law is presented (often an adversary proceeding is a tort or contract suit governed by state law, see, e.g., *In re Teknek, LLC*, 512 F.3d 342, 345 (7th Cir. 2007); *Alliance to End Repression v. City of Chicago*, 356 F.3d 767, 771 (7th Cir. 2004); *SNA Nut Co. v. Haagen-Dazs Co.*, 302 F.3d 725, 729 (7th Cir. 2002); *In re Caldor Corp.*, 303 F.3d 161, 163-64 (2d Cir. 2002)), suggests a negative answer. But a number of cases suggest (none to the contrary) that at least fraud in an adversary proceeding involving

dischargeability is bankruptcy fraud. *In re Kallstrom,* 298 B.R. 753, 758-59 and n.25 (10th Cir. BAP 2003); *In re Parker,* 2003 WL 21703528, at *3 (Bankr. N.D. Ga. July 18, 2003); *In re Taylor,* 190 B.R. 413, 416 n.3 (Bankr. D. Colo. 1995); *In re Nicolosi,* 86 B.R. 882, 887-88 (Bankr. W.D. La. 1988); 10 *Collier on Bankruptcy, supra,* ¶ 7041.01. If the debtor succeeds in obtaining a discharge, a creditor or class of creditors particularly favored by Congress is hurt; hence Bankruptcy Rule 7041 forbids dismissal of a complaint objecting to a debtor's discharge except on notice to the trustee in bankruptcy (as well as to the U.S. Trustee and anyone else that the bankruptcy court directs to be notified). In any event, since the ex-wife's claim in this case was the biggest claim in the bankruptcy proceeding, had the defendant succeeded in knocking it out by his fraud his action would have been fraud in the proceeding itself rather than in an adversary proceeding that had only a tangential effect on the overall bankruptcy case.

We move to the defendant's conviction under 18 U.S.C. § 2252A for possession of child pornography, defined as sexually explicit images of a minor. 18 U.S.C. § 2256(8). The first federal child pornography statute, enacted in 1978 (four years after the defendant took the photographs of his 16-year-old sister-in-law), defined a "minor" to mean anyone under 16. Protection of Children Against Sexual Exploitation Act, Pub. L. No. 95-225, § 2253(1), 92 Stat. 7 (1978). An amendment in 1984 redefined "minor" as anyone under 18. Pub. L. 98-292, § 253(1),

98 Stat. 204 (1984). The defendant was charged with possession of child pornography in 2005 and 2006, long after the statute had been amended to raise the age of majority. But he argues that since the photographs were not illegal when made, the amended statute is inapplicable to him.

He does not argue that Congress can't criminalize the continued possession of pornography that was legal when created. *United States v. Bateman,* 805 F. Supp. 1053, 1055 (D.N.H. 1992); *United States v. Porter,* 709 F. Supp. 770, 774 (E.D. Mich. 1989), *aff'd,* 895 F.2d 1415 (6th Cir. 1990). But he contends that unless his interpretation is adopted, the statute will be incoherent because it creates an "affirmative defense" for cases in which either the "minor" depicted in the pornography possessed by the defendant was actually an adult or the pornography was not produced "using any actual minor." 18 U.S.C. § 2252A(c). (The two clauses are redundant-the second includes the first-but the second is broader because it includes the case in which no person was used in the creation of the pornographic depiction; it might be a painting of an imaginary person or a computer simulation.) One function of the affirmative defense, he argues, is to grandfather the possession of pornography that was legal when it was created. Peel did not raise the issue in the district court, but it is the heart of his challenge to his conviction for child pornography.

At argument the government's lawyer conceded that to prove a violation of the statute the government

has to prove that a real-life minor, not a computer simulation or an adult looking like a minor, was used in the creation of the pornography. The effect of an affirmative defense that entitled the defendant to prove the contrary would thus be that the government would have to prove that a child was used and the defendant would have to prove that a child wasn't used. The statute is confused, but not that confused; and the least plausible interpretation is that it grandfathers a category of what the law now deems to be child pornography.

The affirmative defense came into the statute in 1996, when Congress in the Child Pornography Prevention Act, Pub. L. No. 104-208, § 121, 110 Stat. 3009-26 (1996), for the first time outlawed virtual child pornography-pornography involving a computer simulation of a child rather than an actual child: an image "that ... appears to be ... of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(B) (1996). This language could have been thought to reach a case in which an adult who looked like a child was used in the production of pornography rather than an actual child. But that was not Congress's intent; its concern was with computer simulations. Hence the affirmative defense, explained in the Senate committee report as follows:

> [The bill] ... does not, and is not intended to, apply to a depiction produced using adults engaging in sexually explicit conduct, even where a depicted individual may appear to be a minor. Accordingly, the bill includes ... an affirmative defense provision

> for material produced using adults. Under that provision, it is an affirmative defense to a charge under section 2252A that the material in question was produced using an actual person or persons engaging in sexually explicit conduct, each of whom was an adult at the time the material was produced, provided the defendant did not intentionally pander the material as being child pornography.

S. Rep. No. 358, 104th Cong., 2d Sess. 21 (Aug. 27, 1996).

Within a few years, however, the defense was overtaken by the Supreme Court's decision holding that the production of non-obscene pornography in which no child was involved cannot constitutionally be prohibited, because there is no sexual abuse in such a case, *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 250-51, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002), and only the presence of that abuse, the Court ruled, justifies the suppression of pornography that does not cross the line to obscenity. The government must therefore prove that a child was used unless the pornography is considered obscenity, which only a subset of pornography is, see, e.g., *United States v. Schales,* 546 F.3d 965, 971-72 (9th Cir. 2008); 18 U.S.C. § 1466A, and the statute under which Peel was convicted is not an obscenity statute. *United States v. Irving,* 452 F.3d 110, 120 (2d Cir. 2006); *United States v. Hilton,* 386 F.3d 13, 16 (1st Cir. 2004) (per curiam). (He does not argue that because the photos of his sister-in-law were not

illegal when he took them, they could not constitute sexual abuse of a minor.)

With the government thus required to prove beyond a reasonable doubt that the apparent child in the pornographic image is a real child, the only work left for the provision creating the affirmative defense is to require (in a part of the provision that we did not quote) that the defendant notify the government of his intention to challenge the government's proof that a child was used.

The history makes clear that the affirmative defense was not added to the statute in order to grandfather pornography created before the definition of a child was changed from younger than 16 to younger than 18. It was added to exculpate child pornography made with adult rather than child models, at a time when the Supreme Court had not yet ruled that the making of such pornography could not constitutionally be punished, and therefore at a time when Congress thought it could place the burden of proof concerning the age of the model used in producing the pornography on the defendant rather than on the government. There isn't the slightest indication of a congressional purpose to grandfather a category of child pornography, so that anyone who happened to have pornographic photographs of 16- and 17-year-olds taken before 1984 would be free to market them. Such a person would have a market that was shielded from new competition and thus offered him substantial profit opportunities because after 1984 there could be no further legal production

of such pornography in which an actual child had been used. The possessor would enjoy the same kind of quasi-monopoly as someone who possesses paintings by an artist when he dies prematurely, freezing the quantity of his output and thus pushing up the price.

Possession of a photograph of an underage girl or boy must be knowing, however, and the defendant, besides invoking the affirmative defense, argues that the government failed to prove that he knew in 2005 and 2006 that his sister-in-law had been under 18 when he took the photographs. Actually the evidence of his knowledge was extensive. He had known her since she was in fourth grade, had spent a great deal of time with her at the time of his marriage to her sister, when she was in high school, and years later had represented her (the defendant is a lawyer) in her divorce proceeding.

We turn to the sentencing issues. In calculating intended loss for purposes of determining the guideline range for the defendant's offenses of bankruptcy fraud and obstruction of justice, the judge began with the amount that the defendant owed his ex-wife under the terms of the marital settlement-$230,000-and the amount that the settlement required him to pay her in the future-$2500 per month for the rest of Peel's life. His life expectancy was 17.5 years, so the estimated total payout over that time would be $525,000. So far, so good, for Peel hoped by his blackmail to get her to drop both claims. But Peel argues that the estimated

$525,000 in future monthly payments that he owed his ex-wife should be discounted to present value, since a smaller sum received today and conservatively invested would yield $525,000 over a period of 17.5 years. In civil cases in which the loss for which damages are sought will be incurred in the future (as where the plaintiff in an accident case is disabled from earning future income), courts reduce the future loss to a sum that the plaintiff could invest safely at an interest rate at which the sum would grow to an amount that would compensate him fully for his future loss. See, e.g., *Transcraft, Inc. v. Galvin, Stalmack, Kirschner & Clark,* 39 F.3d 812, 819 (7th Cir. 1994).

Courts do this because civil damages (excluding punitive damages) seek to put the plaintiff in the financial position that he would have occupied had he not been wronged by the defendant. *Illinois School Dist. Agency v. Pacific Ins. Co.,* 571 F.3d 611, 617 (7th Cir. 2009). Because the aim of criminal sanctions is to punish, we find provisions in the sentencing guidelines that would strike a discordant note in a civil case-such as the direction to sentencing judges to include even those losses that "would have been impossible or unlikely to occur," U.S.S.G. § 2B1.1, Advisory Note 3(A)(ii), and the further direction that "loss shall not include the following: Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs," U.S.S.G. § 2B1.1, Advisory Note 3(D)(i), so that the offense level for a financial crime is not increased if

the prosecution is delayed, even though the delay increases the cost of the crime.

The question whether to discount future losses (actual or intended) to present value seems to have arisen rarely in criminal cases. A few cases, however, have discounted a future intended loss to present value, such as *United States v. Broderson,* 67 F.3d 452, 457 (2d Cir. 1995), where just as in a civil case the court required discounting to present value an expected stream of monthly payments of which the defendant had defrauded the government. See also *United States v. Edgar,* 971 F.2d 89, 93-94 and n.5 (8th Cir. 1992); *United States v. Brown,* 338 F. Supp.2d 552, 559 (M.D. Pa. 2004). We have found no cases that refused to discount a future loss to present value if asked to do so. Almost everyone would rather lose $2 in 20 years than $1 today, and this implies that the loss inflicted by appropriating a $2 benefit that the victim would have to wait 20 years to receive is less than taking $1 from him now.

So if a defendant presents credible evidence for discounting a stream of future payments to present value, the district court must consider it. And in this case the defense presented expert evidence that the present value of the stream of future monthly payments that Peel owed his ex-wife was $314,000. This amount, if adopted as the measure of intended future loss and added to the intended present loss of $270,000, would, after subtraction of the $158,000 in cash that the ex-wife would have received under the agreement that Peel tried to force on her, have

produced an offense level two levels below the one applied by the district court. The court, however, rejected the effort to prove present value on the ground that U.S.S.G. § 2B1.1, Application Note 3(E), entitled "Credits Against Loss," does not include, among the credits listed, discounting to present value; credits are such things as "the fair market value of the property returned" to the victim by the criminal before the offense was detected. But credits presuppose that the loss or intended loss has been determined and afterward part of it was restored, as in a case where an embezzler gambles successfully with the embezzled funds and so is able to (and does) return those funds. The amount of the embezzlement is the loss, *United States v. Lauer,* 148 F.3d 766, 767-68 (7th Cir. 1998); *United States v. Mount,* 966 F.2d 262, 266-67 (7th Cir. 1992), but the harm caused by the loss is lessened by the criminal's voluntary act. That has nothing to do with calculating the loss; the calculation precedes consideration of any credits to which the defendant is entitled; and so the application note has no relevance to whether loss is measured by its discounted or an undiscounted value.

We are reluctant to make federal sentencing more complicated than it is, but requiring a calculation of the present value of a future loss, if the defendant presents credible evidence, need not burden the judge, let alone put him in a straitjacket. "The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that

evidence. For this reason, the court's loss determination is entitled to appropriate deference." U.S.S.G. § 2B1.1, Application Note 3(C). Since the guidelines are no longer binding, *Gall v. United States,* 552 U.S. 38, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007); *United States v. Booker,* 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), the judge need not give controlling weight to the present-value calculation.

Of particular relevance to the present case, the nature and circumstances of the defendant's crime may make discounting to present value of only limited utility in assessing loss. Peel's attempted blackmail of his ex-wife is a case in point. A blackmailer is apt not to stick to his deal with his victim but instead to come back for more later, as in *Commonwealth v. Beauchamp,* 49 Mass. App. Ct. 591, 732 N.E.2d 311, 316-17 (2000), and *United States v. Veltmann,* 6 F.3d 1483, 1488-89 (11th Cir. 1993), so that the initially intended loss is apt to understate the loss to the victim had the blackmail succeeded. True, if Peel were to give all the photos back to his ex-wife, as he promised to do, he could not have blackmailed her further. But there would have been no assurance that he would do that, since she didn't know how many of the photos he had. And even if the blackmailer doesn't return for more, the victim is apt to be in constant fear of such a return, adding to the cost of the crime. Ronald H. Coase, "The 1987 McCorkle Lecture: Blackmail," 74 *Va. L. Rev.* 655, 674-75 (1988).

This case has to be remanded for other reasons, and we leave to the discretion of the district judge whether to discount the monetary loss inflicted by a blackmail attempt (in this case an intended such loss) to its present value and how best to weigh that determination in deciding on an appropriate sentence.

Besides not discounting the future loss intended by Peel, the judge added a further intended loss-the $611,000 in other claims that had been filed in the bankruptcy proceeding. By bringing the total intended loss above $1 million (it would have fallen just short of that amount had he done the present-value calculation of the ex-wife's future loss suggested above), the addition further increased Peel's guidelines sentencing range. That addition was error. None of the other creditors (or anyone else) would have been hurt had the blackmail attempt succeeded; nor was it any part of the defendant's intention to hurt them. Intended losses are intended losses, not bookkeeping entries. See *United States v. Arthur,* 582 F.3d 713, 720-21 (7th Cir. 2009); *United States v. Bussell,* 504 F.3d 956, 960-63 (9th Cir. 2007); *United States v. Holthaus,* 486 F.3d 451, 455 (8th Cir. 2007); *United States v. Wheeldon,* 313 F.3d 1070, 1073 (8th Cir. 2002). The creditors would actually have been better off had the blackmail attempt succeeded because there would then have been one less creditor with whom to divide the defendant's meager assets. The bankruptcy court would not have been hurt merely because one creditor had dropped out. In fact it would have saved

time by not having to adjudicate that creditor's claim.

The remaining sentencing issue is whether the judge was right to apply section 2G2.2(b)(3)(A) of the sentencing guidelines, which increases the guidelines sentencing range for child pornography if the pornography was "distribut[ed] for pecuniary gain." The pecuniary gain, the judge determined, was the amount of money that the defendant had hoped to gain from his blackmail attempt. The defendant was offering to sell the pornographic photographs to his ex-wife for forgiveness of part of his debt to her under their marital settlement agreement.

The primary aim of the pecuniary-gain enhancement is to discourage trafficking in pornography, which increases the incentive to create pornography and thus the amount and so the number of abused children, the "models" for the photographs. *New York v. Ferber,* 458 U.S. 747, 761-62 and n.13, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982); see also *United States v. Goldberg,* 491 F.3d 668, 672 (7th Cir. 2007); *United States v. Richardson,* 238 F.3d 837, 839 (7th Cir. 2001). But the use of pornography for blackmail is not obviously less bad conduct than the sale of pornography in the market. The defendant used pornography to avoid a debt and thus for pecuniary gain, and we think that brings him within the scope of the guidelines provision.

It's true that in ordinary language "distribution" suggests sale to more than one person. But in the

guidelines it means "*any act,* including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor," U.S.S.G. § 2G2.2, Application Note 1 (emphasis added). That must include a single sale. Moreover, the defendant was offering to sell to his ex-wife a number of photos, and it is hard to see why selling one pornographic photo to each of (say) five people deserves a heavier punishment than selling five photos to one person, especially given the underlying concern with the harm to the child model used in the photographs.

To conclude, the judgment is affirmed in part and reversed in part, and the case remanded with directions that the judge vacate either the bankruptcy fraud conviction or the obstruction of justice conviction, recalculate the intended loss, redetermine the guidelines sentencing range, and resentence the defendant in accordance with 18 U.S.C. § 3553(a).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

Appendix B

United States District Court,
S.D. Illinois.

UNITED STATES of America, Plaintiff,
v.
Gary E. PEEL, Defendant.
No. 06-CR-30049-WDS.

July 23, 2007.

MEMORANDUM & ORDER

STIEHL, District Judge.

This matter is before the Court on defendant's motion for a new trial (Doc. 152), to which the government has filed a response (Doc. 153). The defendant asserts that there were several errors committed during the trial which denied him a fair trial, e.g. that the court gave improper jury instructions; excluded evidence that prevented the defendant from presenting a complete defense; that the evidence was insufficient to support the defendant's conviction, and that based on these errors, he is entitled to a new trial.

MOTION FOR NEW TRIAL

The Seventh Circuit has held that a motion for new trial should be granted "only if the evidence 'preponderate[s] heavily against the verdict, such

that it would be a miscarriage of justice to let the verdict stand.' " *United States v. Swan,* 486 F.3d 260, 266 (7th Cir. 2007) *(quoting United States v. Reed,* 875 F.2d 107, 113 (7th Cir. 1989) (other citations omitted)). "We view the evidence in the light most favorable to the government, recognizing that it is the exclusive function of the jury to determine the credibility of witnesses and draw reasonable inferences." *United States v. Theodospoulos,* 48 F.3d 1438, 1444 (7th Cir. 1995) *quoted in Swan,* 486 F.3d at 266.

BACKGROUND

The defendant was convicted of all charges in the indictment. Count 1 of the Indictment charged the defendant with bankruptcy fraud, alleging that between January 20 and January 31, 2006, the defendant knowingly and fraudulently gave, offered, received and attempted to obtain money and property, remuneration, compensation, reward, advantage and promise thereof for acting and forbearing to act in a case under Chapter 11 of the Bankruptcy Code, all in violation of 18 U.S.C. § 152(6). Count 2 charged the defendant with obstruction of justice alleging that between January 20 and 31, 2006, the defendant did knowingly and corruptly attempt to obstruct, influence, and impede an official proceeding, all in violation of 18 U.S.C. § 1512(c)(2).

Counts 3 and 4 charged the defendant with possession of child pornography. Specifically, Count

3 charged that on or about January 20, 2006, the defendant knowingly possessed material that contained an image of child pornography that was produced using materials that had been mailed and shipped and transported in interstate and foreign commerce that was placed in the mailbox of the defendant's ex-wife, all in violation of 18 U.S.C. § 2252A(a)(5)(B).

Count 4 charged that on or about January 31, 2006, the defendant knowingly possessed material that contained an image of child pornography that was produced using materials that had been mailed and shipped and transported in interstate and foreign commerce, namely a color photograph containing images of a child, that was located on the person of Gary E. Peel, all in violation of 18 U.S.C. § 2252A(a)(5)(B).

ANALYSIS

1. The Jury Instructions

a. Possession of Child Pornography Counts

The defendant asserts that the Court improperly refused to give an instruction on the question of lasciviousness, i.e. the defendant's subjective intent in taking the photographs in question. The defendant sought to have the jury instructed that his intention when he took the photograph was irrelevant to the determination of whether the image met the definition of child pornography. The photographs in

question involved the depiction of a young girl, who the evidence at trial revealed was sixteen years old, naked on the floor of an office (the defendant's then law office) with her legs spread, and the focus of the photo being her pubic area.

"Child pornography" is defined in 18 U.S.C. § 2256(8) as "any visual depiction, including any photograph ... of sexually explicit conduct, where (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct...." The Court instructed the jury on the definition of "sexually explicit conduct"[1], on the definition of "lascivious"[2] and on the six-factors used to determine whether an image is lascivious as set forth in *United States v. Dost,* 636 F. Supp. 828, 932 (S.D. Cal. 1986) *aff'd sub nom. United States v. Wiegland,* 812 F.2d 1239 (9th Cir. 1987); *see also, United States v. Moore,* 215 F.3d 681, 686 (7th Cir. 2000)[3].

---

[1] Which was defined as "the actual or simulated lascivious exhibition of the genitals or pubic area of any person." (Government's Instruction # 26).

[2] Which was defined as "that which tends to arouse sexual desires. (Government's Instruction # 4).

[3] The six-factor test used to determine whether an image is lascivious is "(1) whether the focal point is on the child's genitalia or pubic area; (2) whether the setting is sexually suggestive, i.e. in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual

The defendant asserts that the Court's failure to give an instruction on his subjective intent expanded the scope of the statute beyond its plain language in violation of his Fifth Amendment rights. He also asserts that failure to give the subjective intent instruction allowed the jury to consider the testimony of Donna Rogers relating to how the photos were produced, including the fact that the defendant posed Rogers for the photographs. The defendant asserts that because the jury had heard evidence that the defendant and Rogers had a sexual relationship at the time the photographs were taken, this allowed the jury to weigh his subjective intentions anyway when determining whether the photographs met the criteria for child pornography.

In this case, the jury had the images to review and were able to determine, based on the instructions given, whether the intended effect of the images met the definition instructions and the six-factor *Dost* test for lasciviousness. The Court remains persuaded that the personal fantasies or personal reaction to the photographs is not relevant to the jury's determination of whether the images were designed to elicit a sexual response from the viewer. The Government did not question the defendant on whether he personally was aroused from the images, nor did it argue that to the jury. In this case, the photos, on their face "appear[ed] to be of a sexual character." *United States v. Kimmerling,* 285 F.3d

---

response in the viewer." *See, Moore,* 215 F.3d at 686. (Government's Instruction # 27).

644, 646 (8th Cir. 2002). The Ninth Circuit in *Wiegland* (affirming the conviction in *Dost)* held that lascivious is "no different in its meaning than 'lewd' a commonsensical term whose constitutionality was specifically upheld" by the Supreme Court. 812 F.2d at 1243-44. Although the Ninth Circuit noted that "private fantasies are not within the statute's ambit" *id.* at 1245, it, nonetheless, stated:

> The picture of a child "engaged in sexually explicit conduct" within the meaning of 18 U.S.C. §§ 2251 and 2252 as defined by § 2255(2)(E) is a picture of a child's sexual organs displayed lasciviously-that is, so presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur.

Id. at 1244. Upon review of the record, the Court remains persuaded that the jury was properly instructed on the issues raised by the charges in Counts 3 and 4 and, therefore, DENIES defendant's motion for a new trial on this ground.

b. Silence in the Face of Accusation

The defendant asserts that the Court erred when it gave the jury an instruction relating to the defendant's silence in the face of accusation by the defendant's former wife during a telephone call.[4] In

---

[4] "You have heard evidence that Deborah J. Peel accused [the] defendant of 'blackmail,' and that the defendant did not deny or object to the accusation. If you find that the defendant was present and heard and understood the accusation, and that it

that conversation, Deborah J. Peel accused the defendant of "blackmail" and he did not respond to the charge. The defendant was not under arrest at that time, and the defendant testified at trial as to the conversation and acknowledged that he did not respond to her assertion of blackmail.

Pursuant to Fed. R. Evid. 801(d)(2)(B) evidence of silence in the face of an accusation is admissible when the defendant is an active participant and a person confronted with such an accusation would normally deny it. "[S]ilence qualifies as an admission because [the] accusation is the type of statement that a party normally would respond to if innocent." *United States v. Ward,* 377 F.3d 671, 676 (7th Cir. 2004). The *Ward* court referenced the Advisory Note to this rule which states, "When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue." *Id.* The jury not only heard the recorded conversation, but also heard the defendant's explanation of that conversation during his testimony at trial. There is no question that the defendant was present when the accusation was made, that he heard it and understood it.

The defendant asserts that the insertion of the term "blackmail" for the language in the pattern instruction "crime" suggested to the jury that his

---

was made under such circumstances that the defendant would deny it if it were true, then you may consider whether the defendant's silence was an admission of the truth of the accusation." (Government's Instruction # 9).

failure to deny the accusation was a confession as a matter of law. The Court **FINDS** that under the circumstances of this case it was proper to give the pattern instruction to the jury on the fact that it could consider "whether the defendant's silence was an admission of the truth of the accusation." 7th Circuit Pattern Jury Instruction 3.03. The jury was not instructed that the silence was an admission as a matter of law, but rather that the jury could consider that fact in its deliberation, and decide if it amounted to an admission. Accordingly, the Court **DENIES** defendant's motion for new trial on this ground.

2. Evidence Related to Deborah J. Peel

The defendant renews his argument made before and during trial that he should have been able to present evidence relating to Deborah J. Peel's alleged misappropriation of funds, her use of joint account funds for a face lift, her bias, untruthfulness, and state of mind, as this evidence was relevant to her credibility as a witness. The Court issued a ruling on these issues as part of its pretrial determination of the government's motion in limine (Doc. 113). The Court found that this evidence was not relevant to the charges in this case, and did not amount to a defense to those charges, and therefore was not relevant and would not be admitted.

The defendant asserts that the improper use of funds, and her explanation about her spending choices was relevant to her credibility, no matter

how proper her access to the funds may have been. The defendant asserts that she misappropriated funds from several joint accounts that were part of the Marital Settlement Agreement. However, the Court found that the record revealed that Deborah J. Peel had access to those accounts, and therefore, the defendant could not establish that she did anything wrong with the funds in those accounts because they were hers to use.

The Court further found that even if the defendant could have established that she did inappropriately use the funds, that fact would not be a defense to the charges in this case. This is a strawman argument which is of little help to the defendant's case. It is rather like saying, "I had no money to feed my children, so I robbed the bank." The fact that there was no money and there were hungry children, is not a defense to the charge of bank robbery. Similarly, the defendant's claim pretrial and during trial that Deborah J. Peel's alleged use of funds led him to be in financial difficulty, and then to commit bankruptcy fraud and obstruction of justice by threatening her with the exposure of the photographs of her sister (the child pornography) is not a defense to either the charge of bankruptcy fraud or obstruction of justice. Exclusion of this evidence simply did not deprive the defendant of a "complete defense."

Similarly, the Court is not persuaded that the state of mind of Deborah J. Peel was relevant. The government did not seek to introduce any out-of-

court statements, and the defendant was able to cross-examine Deborah J. Peel at length about her displeasure with the defendant's attempts to set aside the marital settlement agreement. It was evident that she was not pleased with that settlement, and the jury could easily judge both her credibility and her bias against the defendant, and thereby determine her possible motive for the nature of her testimony. The Court, therefore, properly rejected the defendant's attempt to introduce evidence of her state of mind.

The Court remains persuaded that its ruling (Doc. 113) was proper given the charges in this case, and the defendant has forwarded nothing new which would cause the Court to revisit that ruling. Accordingly, defendant's motion for a new trial on the basis that the Court improperly excluded evidence related to Deborah J. Peel is **DENIED** on all grounds raised.

3. *Defendant's Expert*

The Court set limits on the possible testimony of defendant's proposed expert, Thomas L. Hoops, as part of its pretrial rulings. The defense did not attempt to call Mr. Hoops after the testimony of the defendant. The defendant has raised no new grounds in this part of his motion. The defendant seeks a new trial in which the Court would allow Hoops to testify as to the defendant's financial position relative to his ex-wife during their negotiations on the marital settlement, asserting that his financial position is

relevant to his intent at the time of the incidents that underlie the charges in this case. However, this is the same evidence which the Court previously discussed as non-relevant to the charges. The government did not challenge the propriety of the defendant's filing of his bankruptcy petition, therefore, his financial condition at the time it was filed, his intent in filing the bankruptcy, or how generous his offers were to his ex-wife with respect to the marital settlement remain irrelevant to the charged offenses. The record contains the Court's prior rulings with respect to the possible testimony of Hoops, and the Court, for the same reasons, **DENIES** defendant's motion for a new trial on this ground.

4. Testimony of Marianne Dilman

The defendant renews his objections raised at trial to the testimony of Marianne Dilman who was called by the government to establish the location of Polaroid manufacturing facilities in order to establish that the film used to take the photographs of Rogers was not manufactured in Illinois. The government called Dilman as a fact witness, not as an expert, however, the defendant objected, asserting that she was an expert witness. During the trial the Court ruled that she was an historical facts witness, and not an expert, and allowed her to testify using records provided to her by her employer. Ms. Dilman testified as to the business practices of Polaroid, based upon the records kept by the business. "Businesses have incentives to keep accurate records germane to their business, and so the material

contained in those records is more likely to be truthful than the average hearsay." *United States v. Santos*, 201 F.3d 953, 963 (7th Cir. 2000). Further, "But[,] that is provided that this material-the statements sought to be used in evidence for their truth value-was created or adopted by the business record keeper." *Id.* Here the records about which Ms. Dilman testified, those records establishing that Polaroid did not have plants in Illinois that processed the film used to take the photographs in question, was proper testimony under the business records exception of Rule 803. Accordingly, the Court **DENIES** defendant's motion for new trial on this ground.

5. Whether the Government Proved that the Child Pornography was made with Materials that Traveled in Interstate Commerce.

The defendant asserts that there was no evidence that the paper and ink, the component materials of the photographic paper, used to make the copies of the photographs of Rogers were made outside Illinois. The defendant's argument is, essentially, that the original photos were copied by the defendant, and that there is no proof that the photocopy component materials were manufactured outside of Illinois. The statute provides that the child pornography was "produced using materials" that had traveled in interstate commerce.

Count 3, as discussed above, charged that the defendant knowingly possessed material that

contained an image of child pornography that was produced using materials that had been mailed and shipped and transported in interstate and foreign commerce that was placed in the mailbox of the defendant's ex-wife, all in violation of 18 U.S.C. § 2252A(a)(5)(B). Count 4 charged that the defendant knowingly possessed material that contained an image of child pornography that was produced using materials that had been mailed and shipped and transported in interstate and foreign commerce, namely a color photograph containing images of a child, that was located on the person of Gary E. Peel, all in violation of 18 U.S.C. § 2252A(a)(5)(B). The evidence was that the photocopier traveled in interstate commerce. That photocopier was used to make the copies, therefore, satisfying the statutory requirements for interstate travel. Similarly, as discussed above, the Polaroid paper on which the original photographs were taken traveled in interstate commerce, thereby satisfying the statutory requirements for those charges.

Accordingly, defendant's motion for a new trial on the grounds that the government failed to prove interstate travel is **DENIED** on all grounds raised.

6. The Scienter Requirement of 18 U.S.C. § 2252A

Finally, the defendant asserts that the government failed to establish that the girl depicted in the photographs was a child. The defendant argues that the girl in the photographs appears to be sexually mature, and at the time of the taking of the

photographs, the sexual relationship between Peel and Rogers was legal under Illinois law. The defendant asserts that with respect to the photographs and Donna Roger's age, although he may have known her age at the time he took the photographs, he did not remember her age at the time of the photographs when he possessed them in 2006, the time of the charged offenses of possession of child pornography.

Here, the evidence was that the defendant knew the subject of the photographs as his wife's younger sister. There was a plethora of evidence as to her age at the time the photographs were taken. The defendant's testimony that he thought she was eighteen was presented to the jury, but the jury apparently did not find him to be credible on this point. The Court finds no basis for granting a new trial on this ground and the defendant's motion is **DENIED**.

CONCLUSION

Accordingly, the Court **DENIES** defendant's motion for a new trial on all grounds raised.

IS SO ORDERED.

Appendix C

FILED
MAR 2 3 2007
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS OFFICE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) CRIMINAL NO. 06 CR 30049 WDS
)
GARY E. PEEL,)
)
Defendant.)

VERDICT

We, the jury, find the defendant, GARY E. PEEL, Guilty
(Guilty/Not Guilty)

of Count 3 of the Indictment - Possession of Child Pornography, as charged in the Indictment.

William L. Teal
FOREPERSON

BEST AVAILABLE COPY

FILED
MAR 23 2007
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS OFFICE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) CRIMINAL NO. 06 CR 30049 WDS
)
GARY E. PEEL,)
)
Defendant.)

VERDICT

We, the jury, find the defendant, GARY E. PEEL, Guilty (Guilty/Not Guilty)

of Count 4 of the Indictment : Possession of Child Pornography, as charged in the Indictment.

William L Teal
FOREPERSON

Appendix D

FILED
NOV 19 2007
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS OFFICE

UNITED STATES DISTRICT COURT
Southern District of Illinois

UNITED STATES OF AMERICA
V.

GARY E. PEEL

JUDGMENT IN A CRIMINAL CASE

Case Number: 06-CR-30049-01-WDS

USM Number 07215-025

Phillip J. Kavanaugh, III
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1, 2, 3 and 4 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §152(6)	Bankruptcy Fraud	01/31/2006	Count 1
18 U.S.C. §1512(c)(2)	Obstruction of Justice	01/31/2006	Count 2
18 U.S.C.§2252(a)(5)(B)	Possession of child pornography	01/20/2006	Count 3
		01/31/2006	Count 4

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

November 19, 2007
Date of Imposition of Judgment

William D. Stiehl
Signature of Judge

HONORABLE WILLIAM D. STIEHL, U.S. DISTRICT JUDGE
Name and Title of Judge

19 November 2007
Date

AO 245B (Rev. 06/05) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: GARY B. PEEL
CASE NUMBER: 06-CR-30049-01-WDS

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

144 MONTHS. THIS SENTENCE CONSISTS OF A TERM OF 60 MONTHS ON COUNT 1, 144 MONTHS ON COUNT 2, AND 120 MONTHS ON EACH OF COUNTS 3 AND 4, ALL SUCH TERMS TO BE SERVED CONCURRENTLY.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered _____ to _____

at _____, with a certified copy of this Judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: GARY E. PEEL
CASE NUMBER: 06-CR-30049-01-WDS

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

3 YEARS ON EACH OF COUNTS 1, 2, 3 AND 4, ALL SUCH TERMS TO RUN CONCURRENTLY.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days after being released on supervision and at least two periodic drug tests thereafter, not to exceed 52 tests in a one year period.

☒ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☒ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: GARY E. PEEL
CASE NUMBER: 06-CR-30049-01-WDS

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall provide the probation offices and the Financial Litigation Unit of the United States Attorney's Office with access to any requested financial information. The defendant is advised that the probation office may share financial information with the Financial Litigation Unit.

Since the defendant has been convicted of a sexual offense, he shall comply with all sexual offender registration requirements.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: GARY E. PEEL
CASE NUMBER: 06-CR-30049-01-WDS

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 400.00	$ 1,000.00	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ _____0	$ _____0

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☒ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: GARY P. PEEL
CASE NUMBER: 06-CR-30049-01-WDS

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ ; or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Payments are due immediately through the Clerk of the Court. If the defendant is unable to pay immediately, then payments shall be required while the defendant is incarcerated in the U. S. Bureau of Prisons, in compliance with the Inmate Financial Responsibility Program. While incarcerated, the defendant shall make monthly payments consisting of one-half of the amount of monthly deposits into the defendant's inmate trust account; however, if the account balance is less than $20.00, no payment shall be required. Any financial penalties that remain unpaid at the commencement of the term of supervised release shall be paid at the rate of $25 per month, or 10 % of defendant's monthly gross earnings, whichever is greater.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s).

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Appendix E

United States Court of Appeals,
for the Seventh Circuit.
Chicago, Illinois 60604

March 15, 2010

Before

RICHARD A. POSNER, *Circuit Judge*
DANIEL A. MANION, *Circuit Judge*
DAVID F. HAMILTON, *Circuit judge*

No. 07-3933

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Southern District of Illinois
v.	No. 06-cv-30049-WDS
Gary E. PEEL, *Defendant-Appellant.*	William D. Stiehl, *Judge*

On February 26, 2010, defendant - appellant filed a petition for rehearing and petition for rehearing en banc. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing en banc.* The petition is therefore DENIED.

---

* Circuit Judge Joel M. Flaum did not participate in the consideration of this petition for rehearing.